Supreme Court, U.S.
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In The

Supreme Court of the United States

CARL YOUNGBLOOD,

Petitioner,

vs.

HY-VEE FOOD STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the circuit court properly affirmed summary judgment on behalf of Respondent on Petitioner's claim under 42 U.S.C. § 1981, where Petitioner was neither denied admission to nor service in Respondent's store, was permitted to and completed all desired purchases without any change in the terms or conditions for doing so, and was stopped for suspected shoplifting based upon probable cause only after completing his purchase?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case involves the stop of Petitioner Carl Youngblood ("Youngblood") for suspected shoplifting by employees of Respondent Hy-Vee Food Stores, Inc. ("Hy-Vee"). Based on probable cause established by eyewitness observation, Youngblood was stopped for suspected shoplifting at the front of the Hy-Vee store only after Youngblood completed his purchase. At no time was Youngblood denied entrance to, nor service in, the Hy-Vee store. Before Youngblood was stopped, he was permitted to, and completed, his desired purchase. None of the terms for making or completing that purchase were changed or modified in any way and no special or discriminatory condition of any kind was placed on his ability to purchase.

The district court granted summary judgment to Hy-Vee because Youngblood suffered no actual loss of any contract interest, a necessary element of his 42 U.S.C. § 1981 claim. The circuit court affirmed, setting forth the well-established legal standard governing such claim: "Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred. The requirement remains that a plaintiff must point to some contractual relationship in order to bring a claim under section 1981." (Pet. A-5).

Nothing about this case warrants certiorari. Indeed, the legal standard set forth by the circuit court in this case (which standard the court applied to undisputed facts) is consistent with all other circuit courts addressing

this issue in the retail setting. Contrary to Youngblood's assertions, there is no conflict among the circuits concerning the scope of his contract right under 42 U.S.C. § 1981. Indeed, all courts uniformly hold that a violation of 42 U.S.C. § 1981 requires "interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1071 (2002). In the petition, Youngblood complains of nothing more than alleged "erroneous factual findings or the misapplication of a properly stated rule of law," which are insufficient grounds for certiorari under this Court's rules. S.Ct. R.10. Accordingly, the petition should be denied.

COUNTERSTATEMENT

1. Factual Background. On April 13, 1998, Youngblood entered the Hy-Vee retail food store in order to buy beef jerky. While in the beef jerky section, Youngblood handled numerous canisters of beef jerky simultaneously, weighing them and examining their prices. He did so for five minutes before selecting a canister of beef jerky and walking away. One of Hy-Vee's employees, McVey, observed this and believed Youngblood placed his hands underneath his shirt. McVey believed this behavior to be unusual and indicative of attempting shoplifting so he continued to watch Youngblood. (Pet. A-15 – A-16).

After walking only a few steps away, Youngblood turned and walked back to the beef jerky section where he put the original canister back on the shelf and picked

up another one. Once again, McVey believed that Youngblood put his hands underneath his shirt with the new canister. Thereafter, Youngblood took the new canister and proceeded to the cash registers. (*Id.*).

While watching Youngblood walk toward the registers, McVey went to the beef jerky section and picked up the canister he had seen Youngblood put back on the shelf. When McVey opened the canister, he discovered that there was no foil seal on it and that it had only two or three pieces of beef jerky inside of it, instead of the usual amount. McVey took this canister and followed Youngblood to the front of the store where he paged a manager, Wagner, from a phone near the other registers. At this point, McVey explained to Wagner that he suspected Youngblood had beef jerky underneath his shirt. (*Id.*).

Youngblood completed his purchase and began to exit the store. As he did so, McVey and Wagner stopped him. When asked, Youngblood handed over his receipt and the bag he was carrying. (*Id.*). McVey then took the canister in Youngblood's possession out of the bag and opened it. (Pet. A-17). When he did so, McVey and Wagner saw that it was without its seal and "crammed full" of beef jerky. McVey believed the canister contained more beef jerky than it should have. Youngblood was then asked to go to an upstairs office with the Hy-Vee employees and he complied. The stop in the front of the store lasted only two to five minutes. (*Id.*).

Youngblood waited in the upstairs office for approximately twenty minutes before the police arrived. During

this time, the door to the office remained open and Youngblood was not physically restrained in any way. After the police officer arrived, he asked McVey what Youngblood had done and was told that Youngblood had taken the contents of one canister of beef jerky and placed them into another canister. (*Id.*). After examining the contents of the canister, the officer arrested Youngblood. (Pet. A-3). The criminal charges against Youngblood ultimately were dismissed. (*Id.*).

2. The Proceedings Below. By Order dated December 15, 2000, the district court granted summary judgment to Hy-Vee on all of Youngblood's claims specifically including his "contract clause" claim under 42 U.S.C. § 1981. In holding that Youngblood failed as a matter of law to establish interference with his right to make and enforce a contract, the district court distinguished *Hampton, supra*. "[C]ontrary to [Youngblood's] argument, the only reason the Court in *Hampton* declined to grant summary judgment was because plaintiffs had not completed the redemption of their cologne samples and were in the middle of finalizing this 'contract.' " (Pet. A-37). The district court held, as a matter of law, that probable cause existed for Youngblood's stop and prosecution. (Pet. A-49, A-51). As the district court determined:

> There is no dispute that while McVey was in the meat department, he observed plaintiff standing in front of the aisle containing the beef jerky. There is also no dispute that McVey believed that plaintiff was acting suspiciously and continued to observe him. McVey states that he observed plaintiff with his hands under his shirt and then saw plaintiff walk partway down the

> aisle toward the cash registers. McVey continued watching as plaintiff then turned around and returned to the beef jerky section and placed one canister of beef jerky back on the shelf and selected another. At this point, it was McVey's belief that plaintiff put the second canister underneath his shirt. As plaintiff was walking toward the cash registers, McVey went to the beef jerky section and picked up the canister of jerky that plaintiff had returned to the shelf. He opened it and discovered that it had no foil seal and only two or three pieces of jerky in the canister. After stopping plaintiff, McVey examined plaintiff's canister of beef jerky and saw that it was without its foil seal and appeared to be "crammed full" of beef jerky.

(Pet. A-48).

By Order dated September 17, 2001, Judges Robert Dawson and Theodore McMillian of the circuit's three judge panel, affirmed the district court's award of summary judgment to Hy-Vee on all of Youngblood's claims. Judge Richard Arnold dissented only with respect to the decision on the § 1981 "contract clause" claim.

In its holding, the circuit court set forth the legal issue on appeal as follows: "The question we must determine is whether any contractual relationship remained once Youngblood completed his purchase and if the taking of the beef jerky denied Youngblood a benefit of the contractual relationship." (Pet. A-4). The key to the determination of the issue "is whether any contractual duty remained after Youngblood made his purchase." *Id.* As the Eighth Circuit held:

> Once Youngblood paid the cashier and received the beef jerky from the cashier, neither party owed the other any duty under the retail-sale contract. This case is distinguishable from *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001), where the Tenth Circuit found a contractual relationship existed after the purchase. In *Hampton*, the customer received a coupon for a fragrance sample as a benefit of her purchase and the Tenth Circuit concluded that the store had a contractual duty to allow the customer to redeem the coupon. *See id.* at 1103-05. In this case, nothing that happened after the sale created any further contractual duty on Hy-Vee's part. Accordingly, Hy-Vee cannot be said to have deprived Youngblood of the benefit of any contractual relationship, as no such relationship existed when it took the beef jerky away from Youngblood.

(Pet. A-4 – A-5).

In response to the dissent's position that the "entire contracting process" began the moment Youngblood entered the store, (Pet. A-13), the circuit court set forth the governing and unanimous law: "Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred. The requirement remains that a plaintiff must point to some contractual relationship in order to bring a claim under section 1981." (Pet. A-5). By Order dated November 12, 2001, the circuit court denied Youngblood's petitions for rehearing and rehearing en banc.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH ALL FEDERAL COURT DECISIONS WHICH HOLD THAT § 1981 DOES NOT REGULATE DISCRIMINATION IN ALL ASPECTS OF SHOPPING OR A RETAILERS' LOSS PREVENTION PRACTICES.

The circuit's decision is consistent with the plain language of 42 U.S.C. § 1981, including the 1991 amendments thereto, its legislative history and all courts addressing its application in the retail context. As Part V of his petition makes abundantly clear, Youngblood takes issue solely with Hy-Vee's loss prevention practices and whether Hy-Vee had probable cause to stop him with the merchandise he had just purchased for suspected shoplifting. (Pet. pp. 15-17).[1] In challenging such loss prevention practices, Youngblood seeks to federalize all aspects of the retail shopping experience under the notion that § 1981 protects customers from harassment simply by entering a retail store. This notion has been rejected by every court to address it and, most recently, this Court denied to review this uniformly accepted legal principle. *See Hampton, et al. v. Dillard Department Stores, Inc.*, 247

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[1] Despite Youngblood's arguments (Pet. pp. 15-17), no question for review is presented concerning the Eighth Circuit's proper interpretation of this Court's decisions under Fed.R.Civ.P. 56 as established in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Indeed, Youngblood does not even allege that any conflict in the circuits exists on this point which would explain why he does not seek certiorari of any question concerning the proper application of Rule 56.

F.3d 1091, 1118 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1071 (2002).

As the Tenth Circuit recognized in *Hampton*, all precedent throughout the country on the issue presented in the petition is consistent:

> [W]e refrain from adopting Amicus Curiae's . . . expansive interpretation that § 1981 broadens the scope of relevant civil rights and protects customers from harassment upon entering a retail establishment. Although Amicus Curiae proposes an arguable application, § 1981 is limited to remedy "any act of discrimination committed in the making or the performance of a contract." 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). . . . [W]e cannot extend § 1981 beyond the contours of a contract. We are aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping.

Hampton, 247 F.3d at 1118.

According to Youngblood and the dissent below, however, one need only focus on "where" the events at issue took place in determining whether or not § 1981(b) has been violated. If "on the store premises," (Pet. A-8), the conduct automatically would be subject to a damage action under § 1981. This reasoning focuses not on the contract or its benefits but more broadly on what the dissent improperly characterized as "the entire contracting process – from the time Youngblood entered the store until the time he was prevented from leaving with the beef jerky he had paid for . . . " (Pet. A-13). According to

this reasoning, once an individual enters a retail store, all aspects of the shopping experience immediately would be regulated by § 1981, including surveillance, interruption or detention of any kind at any time, no matter how slight, whether or not such conduct results merely in delay, inconvenience or ultimately prevents the completion of a purchase.[2]

Section 1981 does not regulate a retail store's loss prevention practices. Every court addressing this issue has rejected this expansive interpretation of § 1981. The federal courts unanimously recognize that racially motivated stops, investigations, or surveillance, short of outright denials of a sale or services, are not within § 1981 even though they may be interferences with ongoing shopping activities. In summary of the decisions of the courts on this issue, one federal court observed: "Racial profiling or stereotyping is highly objectionable. But when a private retailer engages in the practice, it does not create a basis for a federal claim by a customer unless the retailer deprives the customer of a right or interest protected by federal statute." *Garrett v. Tandy Corp.*, 142 F.Supp.2d 117, 118 (D. Me. 2001). The courts all hold that plaintiffs who face discriminatory surveillance, harassment or stops for shoplifting before or after completing a

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[2] The dissent describes the "entire contracting process," as follows: "Youngblood was singled out for surveillance by the store clerk before he made his purchase, singled out for suspicion as he walked to the register to make his purchase (when the store clerk alerted the manager), and singled out for detention by three employees as he tried to leave the store with his purchase." (Pet. A-13).

purchase, lack § 1981 claims.[3] Likewise, the courts hold that plaintiffs who are harassed or monitored while browsing or who, due to alleged discriminatory harassment or surveillance, voluntarily forego a purchase, lack § 1981 claims.[4]

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[3] *See Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) (surveillance and stop while browsing after purchase); *Rogers v. Elliott*, 135 F.Supp.2d 1312, 1315 (N.D. Ga. 2001) (accusations of stealing, profanity, and assault after purchase); *Garrett*, 142 F.Supp.2d at 119 (store called police who investigated and searched plaintiff's home and car after purchase); *Nevin v. Citibank, N.A.*, 107 F.Supp.2d 333, 349 (S.D. N.Y. 2000) (store called police who investigated plaintiff at home after purchase); *Jeffery v. Home Depot U.S.A., Inc.*, 90 F.Supp.2d 1066, 1069 (S.D. Cal. 2000) (purchase complete despite harassment and delay due to search request); *Holmes v. Dillard Dept. Store*, No. Civ.A.99-3444, 2000 WL 1725082, *3 (E.D. La. November 17, 2000) (stopped, asked to leave the store, and arrested after purchase); *Hickerson v. Macy's Dept. Store*, No. CIV.A.98-3170, 1999 WL 144461, *2 (E.D. La. March 16, 1999) (stop and harassment at exit and parking lot after purchase); *Singh v. Wal-Mart Stores, Inc.*, No. Civ.A.98-1613, 1999 WL 374184, *6 (E.D. Pa. June 10, 1999), *aff'd*, 225 F.3d 650 (3rd Cir. 2000) (delay, harassed, and interrogated while returning); *Ackaa v. Tommy Hilfiger Company*, No. CIV.A.96-8262, 1998 WL 136522, *6 (E.D. Pa. March 24, 1998) (purchase complete despite alleged discriminatory surveillance, accosting, false accusation of stealing, and removal from store); *Lewis v. J.C. Penney Co., Inc.*, 948 F.Supp. 367, 372 (D. Del. 1996) (stop and search after purchases); *Flowers v. TJX Companies, Inc.*, Case No. 91-CV-1339, 1994 WL 382515, *6 (N.D. N.Y. July 15, 1994) (purchase complete despite alleged discrimination in shopping).

[4] *See Bagley v. Ameritech Corp.*, 220 F.3d 518, 521 (7th Cir. 2000) (plaintiff cut off opportunity to purchase by leaving due to clerk's refusal to wait on her and offensive gestures); *Shawl v. Dillard's, Inc.*, ___ F.3d ___, No. 99-1409, 2001 WL 967887,*3 (10th Cir. Aug. 27, 2001) (allegedly discouraged from purchasing due

All federal courts addressing the issue have held that the actual loss of a § 1981 contract right in the retail environment occurs only when (1) an individual is prevented from making or completing a purchase,[5] or (2) an essential term of making or completing a purchase is changed or a special condition for purchasing is imposed.[6] In a retail sale, where a customer is permitted

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to rude clerk while shopping); *McCrea v. Saks, Inc.*, No. CIV.A.00-CV-1936, 2000 WL 1912726 (E.D. Pa. Dec. 22, 2000) (allegedly harassed and discouraged from purchasing while shopping); *Turner v. Fashion Bug Dept. Store*, 205 F.3d 1342, 1999 WL 1206862, *2 (6th Cir. Dec. 9, 1999) (store called police who arrested plaintiff while browsing); *Wesley v. Don Stein Buick, Inc.*, 42 F.Supp.2d 1192, 1201 (D. Kan. 1999) (harassment, threatening conduct and demand plaintiff leave while browsing); *Sterling v. Kazmierczak*, 983 F.Supp. 1186, 1192 (N.D. Ill. 1997) (stopped and arrested while browsing).

[5] *See Hampton*, 247 F.3d at 1105-06 (plaintiff Hampton prevented from completing redemption of coupon for a cologne sample which coupon she received upon making a purchase); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 874 (6th Cir. 2001), *opinion supplemented on denial of rehearing*, 266 F.3d 407 (6th Cir. 2001) (plaintiff prevented from making desired purchases when she was removed from the store and forced to leave her cart of merchandise behind); *Henderson v. Jewel Food Stores, Inc.*, No. 96 C 3666, 1996 WL 617165, *4 (N.D. Ill. Oct. 23, 1996) (plaintiff prevented from completing purchases in midstream).

[6] *See Hill v. Shell Oil Co.*, 78 F.Supp.2d 764, 777 (N.D. Ill. 1999) (requirement that plaintiffs pre-pay for gas changed an essential term of the buyer/seller contract); *Bobbitt by Bobbitt v. Rage, Inc.*, 19 F.Supp.2d 512, 519 (W.D. N.C. 1998) (requirement that plaintiffs pre-pay changed essential term of the customer/restaurant contract); *Buchanan v. Consolidated Stores Corp.*, 125 F.Supp.2d 730, 735-6 (D. Md. 2001) (refusing to permit plaintiffs to pay by check was special condition placed on ability to contract).

to complete his purchase, the alleged discrimination must take place at the point of sale in order to directly implicate the right to contract and to enjoy all benefits, privileges, terms, and conditions of the contractual relationship. *See Hill*, 78 F.Supp.2d at 777 (discriminatory pre-pay requirement constituted "direct impairment of the terms and conditions of their contractual purchase of gasoline."). Simply, there must be some change in an essential term of, or some special condition imposed on, his customer contract in order for Youngblood to be denied enjoyment of his contractual relationship. *See Id.; Buchanan*, 125 F.Supp.2d at 735-6.

Here, Youngblood was never prevented from making or completing his purchase. Indeed, Youngblood flatly admits completing it. It is further undisputed that no term for completing that purchase was changed nor was any special condition imposed on him. The store was not offering to sell two canisters of beef jerky for the price of one. In the absence of discrimination at the point of sale, Youngblood suffered no actual loss of any contractual right as required to maintain his claim.

Not only would Youngblood's interpretation federalize and regulate a retailer's loss prevention practices and all aspects of the shopping experience, it would negate state merchant's defense statutes such as MO.REV.STAT. § 537.125(2), (4), which have been carefully-crafted to combat the dual problems of discrimination and theft in the retail environment. Such statutes protect merchants from liability for detaining and questioning suspected shoplifters when they have a good faith, reasonable

belief, even if mistaken, that shoplifting is underway.[7] The reasoning of Youngblood and the dissent would render such statutes meaningless whenever a shopper issues a racial challenge to conduct made with probable cause of stealing.

Unless Congress clearly directs, this Court has been reluctant to federalize matters traditionally covered by state law. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462,

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[7] MO.REV.STAT. § 537.125 provides as follows:

> 2. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed or is committing a wrongful taking of merchandise or money from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating whether there has been a wrongful taking of such merchandise or money. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained. . . .
>
> 4. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed a wrongful taking of property, as defined in this section, and who has detained such person and investigated such wrongful taking, may contact law enforcement officers and instigate criminal proceedings against such person. Any such contact of law enforcement authorities or instigation of a judicial proceeding shall not constitute malicious prosecution, nor shall it render the merchant, his agent or employee criminally or civilly liable to the person so detained or against whom proceedings are instigated.

479 (1977). Indeed, the lower courts recognize: "The need to cabin the reach of the civil rights laws so as not to create a 'general federal tort law,' . . . , has long been a theme of the Supreme Court's decisional law." *Spencer v. Casavilla*, 839 F.Supp. 1014, 1019 (S.D. N.Y. 1993) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971)), *aff'd in part, appeal dismissed in part*, 44 F.3d 74 (2nd Cir. 1994).

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT.

Youngblood seeks certiorari based on his ill-conceived assertion that some split exists in the circuits concerning the scope of § 1981's "contract" clause in the context of retail sales. Youngblood boldly (albeit, erroneously) asserts, "[t]he First, Sixth, Seventh, Tenth, and Eleventh Circuits, however, take positions contrary to the Eighth and Fifth Circuits." (Pet. p. 11).[8] No such conflict exists. Indeed, to the extent that they address the scope of § 1981's contractual right at all, the cases cited by Youngblood are entirely consistent with each other and the

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[8] *See Morris v. Dillard Department Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001), where the Fifth Circuit held that banning a customer from a retail store following an arrest is insufficient to constitute the loss of an actual contract interest. Because there was no evidence indicating any tangible attempt to purchase, or return, specified goods, or to enter any other contractual agreement at any time during the course of the ban, the Fifth Circuit held: "We agree with the district court, therefore, that Morris' allegations based on the ban alone are too speculative to establish loss of any contractual interest owed to her by Dillard's." *Id.*, 277 F.3d at 753.

decision below. Youngblood apparently refuses to recognize that the circuits have done nothing more than apply the identical legal principle: There must be "the actual loss of a contract interest, not merely the possible loss of future contract opportunities" to establish a violation under § 1981. *See e.g., Hampton*, 247 F.3d at 1105; *Morris v. Office Max*, 89 F.3d at 414-15.

The Tenth Circuit in *Hampton* applied the identical legal principle as did the Eighth here. Liability was premised on the actual loss of a contract right, i.e., interruption in completing redemption of a cologne sample. *Hampton* vividly exemplifies the governing legal principle uniformly applied by the federal courts. Hampton suffered the actual loss of a contractual interest when she was prevented from redeeming the coupon she received at purchase and, thereby, from receiving her cologne sample. *Id.*, 247 F.3d at 1105-06. To the contrary, in the companion case of Cooper, Hampton's niece, Cooper had no contractual relationship at the time Dillards prevented her from redeeming her coupon. Thus, she did not suffer (and could not have suffered) the actual loss of any contractual right. *Id.*, 247 F.3d at 1117-18.

Only by wholly ignoring the existence of *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996) is Youngblood able to assert that the Seventh Circuit has established any legal standard inconsistent with the decision below. (Pet. pp. 12-13). Indeed, *Morris v. Office Max* is a seminal case in the retail setting. It set forth the guiding legal principle to which all other courts, including the circuit below, adhere – a § 1981 violation requires "the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *Id.*, 89 F.3d at 414-15.

Youngblood's assertion that another Seventh Circuit decision, *Daniels v. Pipefitters Association Local Union No. 597*, 945 F.2d 906 (7th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992) somehow creates a conflict (Pet. pp. 12-13), is simply incredulous. First, *Daniels* does not involve a retail sale of any kind; rather, it deals solely with the employment context. Second, *Daniels* is based on conduct that was actionable even before the 1991 amendments to § 1981, i.e., direct interference with the right to enter into employment contracts through the discriminatory operation of a job referral service at the union hall. *Id.*, 945 F.2d at 914-15.

Despite Youngblood's assertions to the contrary (Pet. p. 12), the Sixth Circuit in *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001), applied the identical legal principle to the facts at issue there. The difference in the outcome was that the plaintiff in *Christian*, unlike Youngblood here, suffered an actual contract loss; *i.e.*, she was prevented from completing any purchases. As the Sixth Circuit held,

> [W]e have no trouble concluding that Christian made herself available to enter into a contractual relationship for services ordinarily provided by Wal-Mart: the record reflects that she had selected merchandise to purchase, had the means to complete the transaction, and would, in fact, have completed her purchase *had she not been asked to leave the store.*

Id., 252 F.3d at 874 (emphasis added).

Although Youngblood asserts that the decision in *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341 (1st Cir. 1995) somehow conflicts with the Eighth

Circuit here (Pet. pp. 11-12), the African-American plaintiff there proceeded only "on the theory that her race-based exclusion from the dining area violated her right to make and enforce contracts." *Id.*, 67 F.3d at 346. Moreover, the First Circuit affirmed summary judgment against plaintiff solely on the grounds that no discriminatory animus existed: "As Alexis points to no competent evidence that Domina and McDonald's intentionally discriminated against her on account of her race, the district court correctly ruled that this section 1981 claim was not trial-worthy." *Id.*, 67 F.3d at 347. Notably, the First Circuit did not reach any issue concerning the nature or scope of Alexis' alleged contract right, as it was unnecessary.

Finally, Youngblood's assertion that *Moore v. Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001) somehow conflicts with any other court on the issue presented here (Pet. p. 13), is utterly incredible. *Moore* dealt solely with jurisdictional and procedural issues associated with state law. Indeed, the case's only substantive connection to § 1981 was that it contained allegations by a class of African-Americans who purchased life insurance policies from Liberty National that the insurance company had a policy of charging higher premiums and paying lower benefits to African-Americans than to whites. The sole issues determined by the Eleventh Circuit were as follows: whether Alabama's common law doctrine of repose applied to and barred plaintiff's federal civil rights claims and whether another federal statute mandated reverse preemption of plaintiff's §§ 1981 and 1982 claims. *Id.*, 267 F.3d at 1212. The Eleventh Circuit simply held that plaintiffs' claims were neither

barred nor reverse preempted. Nothing about this holding conflicts in any manner whatsoever with any court concerning the issue presented for review.

III. THE DECISION BELOW CORRECTLY INTERPRETS 42 U.S.C. § 1981(b) TO INCLUDE ONLY CONTRACTUAL RIGHTS AS REQUIRED BY THE STATUTE'S PLAIN LANGUAGE AND CLEAR LEGISLATIVE HISTORY.

The Eighth Circuit's opinion is an entirely accurate interpretation and application of the law governing Youngblood's § 1981 "contract clause" claim.[9] As the court correctly held, under § 1981, "once the purchase is completed, no contractual relationship remains." (Pet. A-4).[10] This determination is not only fully consistent

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[9] Youngblood does not seek certiorari of the denial of his § 1981 "full and equal benefits clause" claim.

[10] In relying on *Daniels*, Youngblood attempts to make the absurd comparison between the retail contract issue here and the ongoing contractual issues that exist in the employment context. However, the benefits in the employment context arise daily and can arise over a period of years which makes such relationship wholly distinct from the buyer/seller relationship in retailing. The employer/employee relationship requires mutual performance over time *i.e.*, the employer providing work and paying wages and benefits over time in exchange for continuing performance of duties by the employee. The performance and duration of the employment contract is continuous and ongoing until the employee quits or is discharged. In contrast, the buyer/seller relationship in a retail sale involves only payment and acceptance of payment. In retail, "when a person is shopping at a department store, the act of purchasing an item creates a contractual relationship between the buyer and seller." *Holmes*, 2000 WL 1725082, at *2.

with the decisions of all courts which have addressed § 1981 claims based on alleged discrimination in a retail store's loss prevention policies and practices, but also the proper interpretation of the plain language of § 1981 and the 1991 amendments thereto.

The terms of the statute, legislative history, and case law limit § 1981, as distinct from other civil rights and public accommodation statutes, to actual losses of contract rights, not interruptions, surveillance, delays or stops for shoplifting, even if racially motivated. Just as this Court held in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), that § 1982 "is not a comprehensive open housing law," it is clear that even after the 1991 amendments, § 1981 is not a broad-based prohibition of all forms of race discrimination in retailing or public accommodation.

This Court has traced the evolution of 42 U.S.C. § 1981 and addressed its legislative history on more than one occasion. *See e.g., Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994); *Patterson v. McClean*, 491 U.S. 164 (1989); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976).

As the legislative history clearly establishes, the 1991 amendments, which added § 1981(b), do not in any way

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After a purchase is complete, no contractual relationship remains. *Lewis*, 948 F.Supp. at 372.

eliminate or negate the statute's contract base. "The Committee intends this provision to bar all racial discrimination in *contracts.*" H.R. Rep. No. 102-40 (II) at 37, *reprinted in* 1991 U.S.C.C.A.N. 694, 731 (emphasis added). Congress specifically identified the problem with *Patterson* which it was rectifying: "Prior to the *Patterson* ruling, every federal court of appeals had held that section 1981 prohibits not just discrimination at the formation of an employment contract, but discrimination *during the performance of that contract as well.*" H.R. Rep. No. 102-40 (I) at 90, *reprinted in* 1991 U.S.C.C.A.N. 549, 628 (emphasis added). Finding first that *Patterson* conflicted with this federal appellate case law, "The Committee also finds no basis in the Civil Rights Act of 1966 or its legislative history for distinguishing between race discrimination which occurs at the formation of the employment contract and *that which occurs later in the performance of the contract.*" *Id.*, at 92, U.S.C.C.A.N. at 630 (emphasis added).[11]

Recently, the circuit court below succinctly analyzed the legislative history of the 1991 amendments to § 1981 as follows:

> In 1989, the Supreme Court interpreted the "make and enforce" language of § 1981 narrowly, construing the section to prohibit only discriminatory conduct at the "making" of the contract and not covering discrimination after the contract's inception. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 109 S.Ct. 2363,

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[11] Notably, § 1981(b) was passed to address specifically the scope of the statute's prohibition in the employment context which had been limited by the Court's decision in *Patterson.*

> 105 L.Ed.2d 132 (1989). In response to *Patterson*, Congress amended § 1981 through the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The Act broadened, *inter alia*, the phrase "make and enforce contracts": "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (1994) (emphasis added). *Section 1981, as amended, now clearly prohibits racially discriminatory conduct that occurs from the inception through the end of a contract.*

Skinner v. Maritz, 253 F.3d 337, 339 (8th Cir. 2001) (emphasis added).

Congress passed § 1981(b) to confirm that the statutory prohibition on discrimination applies not only to the formation of contracts but the performance of contracts as well. The circuit's decision below embraces and abides by this analysis and interpretation, as do all other courts.[12] In contrast, the reasoning set forth by Youngblood in his petition and the dissent below sweeps broadly past it to encompass, not only, conduct unrelated to contract

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[12] Both the district and circuit courts below focused on the appropriate legal question – when does the contractual relationship at issue in this particular case end? Both then provided the correct legal answer – the buyer/seller contractual relationship in the retail setting ends – and so does § 1981 – once the purchase is complete.

performance but conduct occurring after that contractual relationship has ended as well.[13]

In defending his unlimited expansion of § 1981 (Pet. p. 14), Youngblood "retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 135 (1995). Although Hy-Vee is entirely mindful of the remedial nature of this statute and is in agreement with its noble purposes, they do not provide a *carte blanche* to extend the statute to include protections not contained within it.

As the circuit below has insightfully cautioned,

> When interpreting remedial statutes, however, it is invariably necessary to temper generalized recitations of legislative purpose with the precise language used to define a law's parameters.

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[13] Youngblood's references to Missouri law are wholly erroneous. (Pet. p. 9). Nothing cited by Youngblood extends the duration of his contractual relationship. In Missouri, a cash transaction is complete when the purchase price is paid. Title passes with the acceptance of the price and the sale is completed even though attempted delivery may not ever be fully accomplished. Withholding of possession does not affect the right to or passage of title. *See Calcara v. U.S.*, 53 F.2d 767, 768 (8th Cir. 1931); *see also In re Venie*, 80 F.Supp. 250, 253 (W.D. Mo. 1948); *Matter of Frieze*, 32 B.R. 194, 196 (Bankr. W.D. Mo. 1983). Further, "[o]nce the buyer has inspected the goods and has accepted them, he cannot later reject the merchandise and rescind the contract for claimed defects." *Stephens Indus., Inc. v. American Express Co.*, 471 S.W.2d 501, 504 (Mo. Ct. App. 1971). Here, it cannot be (and has never been) disputed that Youngblood accepted his item, was leaving the store and never attempted to reject it.

> This appeal is illustrative. To be sure, Congress passed the [Americans with Disabilities Act] in a noble effort to eradicate the widespread and senseless discrimination which had for so long persisted against those perceived to be "disabled." Nevertheless, a court of law must venture beyond such sweeping abstractions and ask various questions which, without a doubt, will fail to produce the sort of emotional thunder often engendered by broadly worded statements of remedial intent, but which are indispensable to a meaningful application of a statute.

Dush v. Appleton Elec. Co., 124 F.3d 957, 961 (8th Cir. 1997).

Here, Youngblood was not denied entrance to, nor was he asked to leave, Hy-Vee before fully completing his purchase. Youngblood was denied no services by Hy-Vee. He admits that he completed his purchase and was exiting the store when he was stopped for shoplifting. Simply, no contractual relationship existed at that time. Thus, his allegations concerning conduct after that time did not affect (and cannot have affected) any aspect of a contractual relationship created by the purchase. Further, he neither alleged nor established that any term of his customer contract was changed in any way, or that any special or discriminatory condition was imposed on him. Accordingly, as the circuit below properly affirmed, Youngblood's § 1981 contract claim fails as a matter of law. This determination is consistent with the plain language of the statute including the 1991 amendments, its legislative history and the decisions of all courts addressing the issue.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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